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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, APPELLANT

v.

HUBERT L. WILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-19a) is not yet reported.

JURISDICTION

The order of the district court granting summary judgment against the United States (App. A, *infra*, 1a-19a) was entered on August 29, 1979. The United States filed a notice of appeal from this order on

September 26, 1979 (App. C, *infra*, 22a-23a). On November 19, 1979, Mr. Justice Stevens extended the time for docketing the appeal to and including December 24, 1979.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

QUESTIONS PRESENTED

1. Whether the 1976 Pay Act (Pub. L. No. 94-440, 90 Stat. 1439, 1446) and the 1977 Pay Act (Pub. L. No. 95-66, 91 Stat. 270) served to supersede or rescind the provisions of the Executive Salary Cost-of-Living Adjustment Act that authorized cost-of-living increases in 1976 and 1977 for, among other ranking government officials, Article III judges.

2. Whether, at the time the 1976 and 1977 Pay Acts were enacted, the cost-of-living increases pre-

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[1] On September 24, 1979, the clerk of the district court entered judgment (App. B, *infra*, 20a-21a) on the district court's decision. The government was unaware of the entry of this judgment at the time it filed the notice of appeal on September 26. As a precaution, on October 17, 1979, the United States filed a notice of appeal (App. D, *infra*, 24a-25a) from the September 24 judgment. Because 28 U.S.C. 1252 permits a direct appeal to this Court from an "interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional in any civil action * * * to which the United States * * * is a party," and because 28 U.S.C. 2101(a) requires the notice of appeal in such cases to be filed within 30 days "after the entry of the interlocutory or final order, judgment or decree," it appears that the operative notice of appeal is the one filed on September 26, 1979.

scribed in the Adjustment Act constituted "compensation" of Article III judges within the meaning of the Compensation Clause of the Constitution.

3. Whether the failure to increase the salaries of Article III judges in accordance with the Adjustment Act violated the Compensation Clause, where such failure did not represent a discriminatory attack on Article III judges and was not done with the purpose or effect of undermining their independence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause of the Constitution, the pertinent portions of the applicable salary statutes, and 28 U.S.C. 2109 are set forth in Appendix E, *infra*, 26a-33a.

STATEMENT

This case is a class action brought under Fed. R. Civ. P. 23(b)(2) on behalf of all persons who were Article III judges in 1976 and 1977. Appellees contend that two Acts of Congress that superseded scheduled cost-of-living increases for, *inter alia*, federal judges in 1976 and 1977 are invalid under the Compensation Clause of the Constitution (Article III, Section 1; App. E, *infra*, 26a). After certifying the class, the district court granted appellees' motion for summary judgment. The court held that the failure to increase the judges' salaries constituted a diminishment of their compensation and that the Acts were therefore unconstitutional. The court also found that, as a matter of statutory construction, neither of the

Acts served to modify or repeal existing legislation prescribing the cost-of-living adjustments.

1. The federal pay system consists of a complex array of statutory and regulatory provisions. Insofar as pertinent here, this system may be summarized as follows.

The salaries of federal judges, as well as those of the Vice President, Cabinet officers and other heads of agencies, members of Congress, and additional designated officials of the executive, legislative, and judicial branches, are determined pursuant to the Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, Title II, Section 225(a)-(k), 81 Stat. 642-645, 2 U.S.C. 351-361 ("Federal Salary Act"). See 2 U.S.C. 356.[2] Under this Act, the salaries of these officials are reviewed every four years (commencing in fiscal year 1969) by the Commission on Executive, Legislative, and Judicial Salaries appointed in accordance with the terms of the statute. See 2 U.S.C. 352, 356. This "review by the Commission shall be made for the purpose of determining and providing (i) the appropriate pay levels and relationships between and among the respective offices and positions covered by such review, and (ii) the appropriate pay relationships between such offices and positions and the offices and positions subject to [classification and General Schedule (GS) pay rates under 5 U.S.C. 5101 *et seq.*, 5331 *et seq.*]." 2 U.S.C. 356. The Commission then reports to the President the results of its

[2] The salary of the Vice President was brought within the Act in 1975. Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, Section 206, 89 Stat. 423.

review and its salary recommendations. 2 U.S.C. 357. Thereafter, in the next budget transmitted to Congress, the President recommends the exact rates of pay that he deems advisable for each of these offices and positions. 2 U.S.C. 358. The President's recommendations become final and effective, at the time provided in the Act, following approval by both Houses of Congress. 2 U.S.C. (Supp. I) 359.

The Federal Salary Act contains no provision for annual adjustments to the salaries of officials covered by the Act, including federal judges. Rather, the sole means specified in that Act for modifying such salaries is the quadrennial review process. In 1975, however, Congress enacted the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419 ("Adjustment Act"). This Act is generally applicable to the offices covered by the Federal Salary Act,[3] including those of the Vice President (3 U.S.C. 104), Cabinet officers and other Executive Schedule officials (5 U.S.C. 5318), members of Congress (2 U.S.C. 31), and federal judges (28 U.S.C. 461).[4] Under the Adjustment Act, such salaries are

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[3] Apparently, the only exception concerns the Governors of the United States Postal Service, who are subject to the Federal Salary Act (2 U.S.C. 356(E)) but are not covered by the Adjustment Act (see 39 U.S.C. 202(a)). In addition, the Adjustment Act indirectly affects those General Schedule (GS) employees whose salaries are at the statutory maximum set by the lowest Executive Schedule rate. See note 6, *infra*.

[4] 28 U.S.C. 461 extends to federal judges by virtue of 28 U.S.C. 5 (Supreme Court justices), 44(d) (court of appeals judges), 135 (district court judges), 173 (Court of Claims

subject to an annual adjustment equal to the average percentage cost-of-living adjustment made in the General Schedule (GS) pay rates pursuant to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301, 5305-5308 ("Comparability Act").[5]

Annual cost-of-living adjustments under the Comparability Act are governed by 5 U.S.C. 5305. The initial step in this process is for the President to designate an appropriate agent to compare the GS rates "with the rates of pay for the same levels of work in private enterprise as determined * * * by the Bureau of Labor Statistics * * *." 5 U.S.C. 5305(a)(1)(A). Following this study, the agent submits to

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judges), and 213 (Court of Customs and Patent Appeals judges). See also 28 U.S.C. 252 (Customs Court judges) and 792 (Court of Claims commisisoners); 11 U.S.C. 68 (bankruptcy referees). In addition, other non-Article III judges included in the Federal Salary Act are indirectly covered by the Adjustment Act because their salaries are expressly set at the level of district court or court of appeals judges. See 10 U.S.C. 867(a)(1) (Court of Military Appeals judges); 26 U.S.C. 7443(c) (Tax Court judges). See also 28 U.S.C. 603, as amended, Pub. L. No. 95-539, Section 6, 92 Stat. 2044 (Director and Deputy Director of the Administrative Office of the United States Courts).

[5] Under the Comparability Act, and hence also under the Adjustment Act, cost-of-living adjustments can result in salary decreases as well as increases, depending upon economic conditions. However, Congress provided in the Adjustment Act that a salary adjustment not be made "to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office." 28 U.S.C. 461(b).

the President a report that makes the above comparison between GS and private salaries and recommends appropriate adjustments in the GS rates of pay. 5 U.S.C. 5305(a)(1).

After considering this report and also the findings and recommendations of the Advisory Committee on Federal Pay (5 U.S.C. 5305(a)(2), 5306), the President may adjust the GS rates in accordance with the principles of comparability contained in 5 U.S.C. 5301(a), in which event he must transmit to Congress a report of the pay adjustment including a determination of the overall percentage adjustment in the General Schedule. 5 U.S.C. 5305(a)(2), (3). However, if, "because of national emergency or economic conditions affecting the general welfare," the President considers it inappropriate to make such an adjustment, he must transmit to Congress an alternative plan setting forth an appropriate adjustment and specifying the overall percentage increase (or decrease) in the GS rates of pay. 5 U.S.C. 5305(c)(1). The President's alternative plan becomes effective "on the first day of the first applicable pay period commencing on or after October 1 of the applicable year," and thereafter remains in effect, unless, within 30 legislative days as defined in the statute, either House of Congress adopts a resolution disapproving the alternative plan. 5 U.S.C. 5305(c)(2). In that event, the President must again consider the report of his agent and adjust the rates of pay in accordance with the principles of comparability. 5 U.S.C. 5305(c)(2), (m). See *National*

Treasury Employees Union v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

2. In October 1975, GS salaries were increased by an overall average of 5% pursuant to the Comparability Act, and federal judges and others covered by the Adjustment Act received a like increase. Exec. Order No. 11883, 3 C.F.R. 1024 (1971-1975 Comp.); 11 Weekly Comp. of Pres. Docs. 910 (Aug. 29, 1975). This adjustment raised the annual salary of district judges to $42,000 and of court of appeals judges to $44,600.

In October 1976, GS salaries were increased under the Comparability Act by an overall average of 4.8%. Exec. Order No. 11941, 3 C.F.R. 151 (1976 Comp.); 12 Weekly Comp. of Pres. Docs. 1435 (Oct. 1, 1976). On October 1, 1976, Congress enacted the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, 1446 (App. E, *infra*, 31a) ("1976 Pay Act"). The 1976 Pay Act provided that "none of the funds appropriated in this Act or in any other Act shall be used to pay the salary [of an individual covered by the Federal Salary Act] * * * at a rate which exceeds the salary rate in effect on September 30, 1976 [except increases pursuant to the four-year review of the Federal Salary Act] * * *" (*ibid.*). Because of this provision, cost-of-living increases that otherwise would have taken effect under the Adjustment Act did not occur for officials within the Federal Salary Act, including the Vice President, Cabinet officers and other Executive Schedule personnel. members of Congress, and federal judges.

Less than four months later, in January 1977, the President recommended substantial salary increases for these officials pursuant to the quadrennial review under the Federal Salary Act. For example, salaries for district judges were increased by 29.8% to $54,500, and salaries for court of appeals judges were increased by 28.9% to $57,500. These increases became effective in March 1977. 42 Fed. Reg. 10297 (1977).

In order "to deal with the anomalous situation of Members of Congress, high level Federal executives and Federal judges receiving two pay raises in the same calendar year," H.R. Rep. No. 95-458, 95th Cong., 1st Sess. 2 (1977), Congress in July 1977 passed Pub. L. No. 95-66, 91 Stat. 270 (App. E, *infra*, 32a) ("1977 Pay Act"). The 1977 Pay Act provided that the cost-of-living increases that otherwise would have become effective in October 1977 under the Adjustment Act "shall not take effect" for the Vice President, members of Congress, Cabinet officers and Executive Schedule officials, and federal judges, commissioners and referees. As the House Report explained (H.R. Rep. No. 95-458, *supra*, at 1, 2):

> The sole purpose of [the 1977 Pay Act] is to eliminate the expected October 1977 comparability adjustment for certain individuals in the executive, legislative, and judicial branches whose rates of pay were increased earlier this year pursuant to the recommendations of the Quadrennial Commission.

* * * * *

> The purpose of the comparability pay system is to insure that pay rates in the Federal service will remain comparable to those in the private sector. Thus, in essence, that system serves much the same purpose as do the recommendations of the Quadrennial Commission. Since those recommendations have now been implemented and the goals of comparability have been achieved, this committee believes it would be inappropriate for persons covered by the Quadrennial Commission's recommendations to receive a comparability increase this October.

In October 1977, GS salaries, which generally had not been affected by the March 1977 increase pursuant to the quadrennial review,[6] were raised by an overall average of 7.1% under the Comparability Act. Exec. Order No. 12010, 3 C.F.R. 142 (1977 Comp.); 13 Weekly Comp. of Pres. Docs. 1436 (Sept. 20, 1977).

3. On February 7, 1978, appellees commenced this litigation in the United States District Court for the Northern District of Illinois to challenge the 1976 and 1977 Pay Acts.[7] As elaborated in the memorandum in support of their motion for summary judg-

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[6] GS salaries are not subject to the Federal Salary Act. However, under 5 U.S.C. 5308, the lowest level in the Executive Schedule sets a ceiling that cannot be exceeded by any GS salary. The March 1977 increase under the Federal Salary Act served to raise this ceiling from $39,600 to $47,500, and thus those GS employees who had reached the previous ceiling benefited from this increase.

[7] The jurisdiction of the district court was invoked under the Tucker Act, 28 U.S.C. 1346(a)(2) (App. A, *infra*, 2a).

ment, appellees contended in Count I of the amended complaint that the 1976 Pay Act was merely an appropriations measure that refused to provide funds for the 1976 cost-of-living increase but did not modify their substantive entitlement to the increase under the Adjustment Act (App. A, *infra*, 4a; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 25-32). Alternatively, appellees argued that the 1976 Pay Act was unconstitutional under the Compensation Clause insofar as it denied them the 1976 cost-of-living increase (App. A, *infra*, 4a; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 25, 32). In Count II of the amended complaint, appellees asserted that the 1977 Pay Act violated the Compensation Clause by superseding the cost-of-living adjustment scheduled to take effect in October 1977 (App. A, *infra*, 5a; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 33-35). Appellees sought a declaration that the failure to pay them the 1976 and 1977 cost-of-living adjustments was unlawful and an injunction requiring the United States to pay them these salary increases.

By order dated March 20, 1979, the district court granted appellees' motion for class certification under Fed. R. Civ. P. 23(b)(2). The Count I class, relating to the 1976 Pay Act, was defined to be all persons who served as Article III judges during part or all of the period between October 1, 1976, when the 1976 cost-of-living adjustment was scheduled to take effect, and March 1, 1977, when a salary increase

occurred pursuant to the Federal Salary Act. The Count II class, relating to the 1977 Pay Act, consisted of all persons who were appointed Article III judges prior to July 11, 1977 (the date of enactment of the 1977 Pay Act) and held office subsequent to October 1, 1977 (the date on which, but for the 1977 Pay Act, the 1977 cost-of-living adjustment would have become effective for federal judges). The district court's order expressly noted that no judge appointed after July 11, 1977, was a member of either class.[8]

On August 29, 1979, the district court granted appellees' motion for summary judgment (App. A, *infra*, 1a-19a). The court held that the failure to increase the salaries of federal judges in 1976 and 1977 in accordance with the Adjustment Act constituted a diminution of the judges' compensation and thus violated the Compensation Clause. In reaching this result, the court agreed with appellees that (*id.* at 7a-8a)

> once the * * * [Adjustment Act,] granting judges "a salary at an annual rate determined under * * * [the Federal Salary Act] as adjusted by Section 461 of this Title," became law [in 1975], the right to an annual adjustment, measured by the average adjustment in the General Schedule, became a part of a judges' [*sic*] compensation which may not be "diminished."

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[8] The district judge in this case had been appointed to the bench subsequent to July 11, 1977, and thus was not a member of either class.

Finding that the failure to pay the 1976 and 1977 cost-of-living adjustments represented a direct reduction of the judges' compensation, the court concluded that the 1976 and 1977 Pay Acts were unconstitutional even though they "[did] not discriminate against judges * * * [or] make inroads on their independence" (*id.* at 16a). In addition, as a matter of statutory construction, the court held that neither the 1976 Pay Act nor the 1977 Pay Act modified or repealed the substantive provisions of the Adjustment Act authorizing an annual cost-of-living increase for judges (*id.* at 18a). The court thus entered judgment for appellees for the unspecified amounts of unpaid compensation on both counts of their complaint (*id.* at 20a-21a).

THE QUESTIONS ARE SUBSTANTIAL

This case presents important questions regarding the constitutional relationship of the Legislative and Judicial Branches. The district court has held unconstitutional two Acts of Congress, insofar as they applied to Article III judges, that superseded scheduled cost-of-living increases in 1976 and 1977 for high-ranking government officials including, in addition to judges, the Vice President, Cabinet officers and other top Executive Branch personnel, and members of Congress. In our view, nothing in the Compensation Clause requires an exemption for Article III judges from federal statutes such as the Pay Acts that do not, in either purpose or effect, discriminate against judges or constitute an attack on their in-

dependence. Moreover, by holding that future increases in judges' salaries under the Adjustment Act are part of the "compensation" that cannot constitutionally be diminished, the district court's decision would effectively prevent Congress from ever modifying, for sitting federal judges, the existing statutory pay system. Such a result would unduly curtail legislative prerogatives in this area and would, as a matter of constitutional doctrine, forever freeze into law the present salary plan that Congress enacted less than five years ago.

The issues presented in this case are also likely to be recurring. Federal judges have already brought another action under the Compensation Clause challenging the extent of their salary increases for 1978 and 1979,[9] and the Director of the Administrative Office of the United States Courts has likewise filed suit contesting the 1979 judicial salary increase.[10] In addition, under the district court's interpretation that the 1976 and 1977 Pay Acts did not substantively supersede the cost-of-living increases, members of Congress and many Executive Branch em-

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[9] In *Will* v. *United States*, No. 79 C 4368 (N.D.Ill., filed Oct. 19, 1979), plaintiffs have challenged (1) Section 304(a)(1) of the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 788-789, which superseded the Adjustment Act increase scheduled for October 1978, and (2) Section 101(c) of Pub. L. No. 96-86, 93 Stat. 657 (1979), which limits the Adjustment Act increase effective in October 1979 to 5.5%.

[10] See *Foley* v. *Carter*, No. 79-3063 (D.D.C., filed Nov. 9, 1979).

ployees might assert a claim to salary increases. Similarly, because, under the district court's construction, the 1977 cost-of-living increase would be part of the base judicial salary for subsequent years, recently appointed Article III judges who are not members of the classes in this case may also seek higher salaries.[11]

Finally, the district court's decision would impose substantial expense and administrative burden on the government. Any salary increases resulting from the district court's decision are not limited to past years but, having become part of the base salary, also continue into the future until such time as the next quadrennial increase under the Federal Salary Act takes effect (currently scheduled for 1981). This is true not only for the class members in this case but also for all other officials who are entitled to increases under the court's construction of the 1977 Pay Act.[12]

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[11] We also note that the salaries of various other positions, although not protected against diminution by Article III, may be subject to increase under the district court's construction of the Pay Acts. See, *e.g.*, 28 U.S.C. 252 (Customs Court judges), 603, as amended, Pub. L. No. 95-539, Section 6, 92 Stat. 2044 (Director and Deputy Director of the Administrative Office of the United States Courts), and 792 (Court of Claims commissioners); 10 U.S.C. 867(a)(1) (Court of Military Appeals judges); 26 U.S.C. 7443(c) (Tax Court judges). In addition, GS employees who were at the pay ceiling in 1977 may also be entitled to increases under the district court's ruling. See 5 U.S.C. 5308; note 6, *supra*.

[12] This case presents a threshold question whether the Justices of this Court are disqualified to participate in this appeal. As noted above (pages 11-12, *supra*), the Count I and Count II classes certified by the district court include all persons who

were Article III judges during 1976 and 1977. Thus, the Justices of this Court are members of the classes and, as such, fall within the provisions of 28 U.S.C. 455(b)(4) and (5)(i) that disqualify any judge who has "a financial interest in the subject matter in controversy" or "[i]s a party to the proceeding." In addition, even if not formally class members, the Justices might have a sufficient interest in the outcome of the litigation to raise a question of disqualification. See 28 U.S.C. 455(a). See also *Evans* v. *Gore*, 253 U.S. 245, 247-248 (1920); *Atkins* v. *United States*, 556 F.2d 1028, 1035-1040 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

In the event that a direct appeal to this Court cannot be heard and determined because of the absence of a quorum of qualified Justices, 28 U.S.C. 2109 (App. E, *infra*, 32a-33a) and 28 U.S.C. 291 *et seq.* provide that the Chief Justice may remit the case to the court of appeals for the appropriate circuit to render a final and conclusive decision. However, the majority of federal judges are members of the classes in this case and thus would be disqualified; indeed, only one judge of the United States Court of Appeals for the Seventh Circuit is not a class member. More important, as discussed in the text, every currently sitting federal judge is affected by the district court's statutory ruling that the 1977 Pay Act did not modify the Adjustment Act or supersede the 1977 cost-of-living increase. Hence, all federal judges would be disqualified from participating in this appeal.

Because 28 U.S.C. 2109 is thus unavailable, we submit that the disqualification issue should be resolved by invoking the "rule of necessity"—that a judge is not disqualified if there is no other judge able to decide the case, thereby ensuring that the litigants are not deprived altogether of the judicial processes provided by law. See *Evans* v. *Gore*, *supra*. A decision by this Court is especially appropriate and important in the instant case, which presents significant issues concerning the separation of powers between the Legislative and Judicial Branches and turns on the interpretation of a constitutional provision that the Court has had little occasion to consider. Moreover, for the reasons set forth in the Memorandum for the United States on Certificate from the United States Court of Claims, *Atkins* v. *United States*, certificate dismissed, 426 U.S. 944 (1976), a copy of which is being sent to counsel

1. In a single paragraph at the end of its opinion, the district court ruled (App. A, *infra*, 18a) that neither the 1976 nor the 1977 Pay Act "contains language which expressly or impliedly indicates that Congress was modifying or repealing the provisions of the Adjustment Act." Because affirmance of the district court's judgment on this statutory ground would obviate the need for the Court to consider the constitutional issues presented, we address ourselves at the outset to the statutory question.[13]

The district court concluded (App. A, *infra*, 18a) that the 1976 Pay Act did not alter the substantive terms of the Adjustment Act, but instead was merely an appropriations measure that refused to fund the 1976 Adjustment Act increases. The court did not separately consider the 1977 Pay Act (which was not

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for appellees, we submit that 28 U.S.C. 455 did not abrogate the rule of necessity. See also *Duplantier* v. *United States*, 606 F.2d 654, 662-663 (5th Cir. 1979); *Atkins* v. *United States*, *supra*, 556 F.2d at 1039-1040; *Pilla* v. *American Bar Association*, 542 F.2d 56, 58-59 (8th Cir. 1976). Accordingly, in our view, the Justices of this Court are not barred from participating in the disposition of this case and, as the forum designated by Congress in 28 U.S.C. 1252, the Court can and should hear the appeal.

[13] A direct appeal pursuant to 28 U.S.C. 1252 "brings before [the Court], not only the constitutional question, but the whole case * * *." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975). See also *United States* v. *Raines*, 362 U.S. 17, 20, 27 n.7 (1960); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 541 (1939). Thus, the statutory issue is properly presented here and should be resolved before the Court turns to the constitutional questions involved in this case. See *Fusari* v. *Steinberg*, 419 U.S. 379, 387-388 n.13 (1975).

an appropriation statute) but nonetheless concluded (*ibid.*) that this Act also did not modify or repeal the provisions of the Adjustment Act.

In our view, the district court erred in construing the Pay Acts in this manner. With respect to the 1976 Pay Act, "[t]here can be no doubt that Congress could suspend or repeal * * * by an * * * appropriation bill" the Adjustment Act's authorization for the 1976 cost-of-living increases. *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940). Thus, the only question is whether Congress expressed with sufficient clarity its intention to amend substantive legislation by means of an appropriations act. Compare *TVA* v. *Hill*, 437 U.S. 153, 189-191 (1978).

We submit that there is ample indication of Congress' intent to supersede the Adjustment Act increase for 1976. The alternative construction of the 1976 Pay Act, advocated by appellees (Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 23) and adopted by the court below (App. A, *infra*, 18a), is that Congress simply refused to pay the full salaries that, arguendo, it recognized were required by law. It should not lightly be presumed, however, that Congress would act to deny funds to satisfy the government's acknowledged, lawful obligations under the Adjustment Act. Rather, the more likely inference is that Congress intended to amend the Adjustment Act in order to modify the basic obligations themselves.

The legislative history of the 1976 Pay Act confirms that Congress intended to bar the 1976 Adjustment Act increases. The 1976 Pay Act was intro-

duced on the floor of the House as an amendment to the Legislative Branch Appropriation Act of 1977. 122 Cong. Rec. 28861, 28872 (1976). In introducing the provision, Representative Shipley explained that the "amendment prevents the automatic cost-of-living pay increase * * * during the fiscal year ending September 30, 1977." *Id.* at 28872.[14] See also *id.* at 28862 (remarks of Rep. Shipley) ("My amendment is very simple. No [one] * * * will receive any increase in salary with regard to the cost-of-living increase"). This understanding—that the provision prohibited the cost-of-living adjustments—was repeatedly recognized in the floor debate on the Shipley Amendment.[15] Moreover, despite Representative

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[14] As originally proposed, the Shipley Amendment only applied to salary increases for members of the House of Representatives. However, the provision was later expanded to include all persons covered by the Federal Salary Act. See 122 Cong. Rec. 28877 (1976) (remarks of Rep. Udall). The bill initially passed by the Senate limited the 1976 Pay Act to members of Congress, but the Conference Committee accepted the House version that extended the Pay Act to all positions covered by the Federal Salary Act. See 122 Cong. Rec. 31859 (1976) (remarks of Sen. Hollings).

[15] See, *e.g.*, 122 Cong. Rec. 28863 (1976) (remarks of Rep. Coughlin) ("terminating the automatic cost-of-living increases * * * for this October"); *ibid.* (remarks of Rep. Armstrong) ("preclude a cost-of-living increase * * * during the current fiscal year"); *ibid.* (remarks of Rep. Yates) ("freeze the salaries"); *id.* at 28865 (remarks of Rep. McClory) ("effectively eliminate the present cost-of-living increases"); *id.* at 28870 (remarks of Rep. Derwinski) ("freezing * * * pay at its current level"); *id.* at 28872 (remarks of Rep. Armstrong) ("freeze the salary for the time being"); *id.* at 28877 (remarks of Rep. Udall) ("there

Wirth's explicit objection that it was inappropriate to enact substantive legislation in an appropriations bill (*id.* at 28863), the provision was overwhelmingly adopted by the House (*id.* at 28881).

Senate consideration of the provision reflects the same understanding. The floor debate contains numerous references to the fact that the Pay Act would eliminate the 1976 cost-of-living increase under the Adjustment Act.[16] This view was also expressed by Senator Hollings who, in submitting the Conference

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is not going to be a cost-of-living increase for [individuals covered by the Federal Salary Act]"); *id.* at 28880 (remarks of Rep. Anderson of California) ("block a cost-of-living pay increase for the Congress, Senators, super grades in the executive branch, and Federal judges"); *ibid.* (remarks of Rep. Vander Veen) (Shipley Amendment would "achieve the same end" as a bill Representative Vander Veen had previously sponsored to "eliminate cost-of-living increases for Congressmen").

[16] See, *e.g.*, 122 Cong. Rec. 29132 (1976) (remarks of Sen. Allen) ("the salary freeze * * * [adopted by] the House of Representatives"; "the House amendment providing for a salary freeze for top Federal officials in all three Branches of government"); *ibid.* (remarks of Sen. Taft) ("effectively freeze those salaries—the employees would not be given a cost-of-living raise on October 1, or a salary increase"); *id.* at 29164 (remarks of Sen. Allen) ("an amendment freezing the compensation of Members of Congress, House and Senate, the members of the judiciary, and the top ranking members of the executive branch"); *id.* at 29171 (remarks of Sen. Muskie) ("a freeze on * * * salaries"); *ibid.* (remarks of Sen. Helms) ("prevent implementation of a salary increase brought about by this past year's inflation"); *id.* at 29172 (remarks of Sen. Allen) ("denied the upcoming increase on October 1 * * * [T]heir salaries [would be] frozen at the September 30, 1976, level * * *").

Report on the bill, emphasized that the 1976 Pay Act was intended "to insure that none of the affected positions would receive this year's cost-of-living increase * * *." 122 Cong. Rec. 31860 (1976).[17] See also *id.* at 31862 (remarks of Sen. Percy) ("disallowing pay raises for Federal judges, top Government officials and employees, and members of Congress * * * a pay freeze"). Thus, we submit that the legislative history of the 1976 Pay Act demonstrates that Congress intended to supersede the provisions of the Adjustment Act authorizing cost-of-living increases to take effect in October 1976.[18]

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[17] We recognize that Senator Hollings had earlier stated that the 1976 Pay Act was "undraftsmanlike" because it "did not say that the salaries would not be increased under the law, but that the funds could not be used for any increases. The basic law is still there. There is a lawsuit about some of those already frozen, and we will apparently have another suit under this one." 122 Cong. Rec. 29168 (1976). This ambiguous statement can best be read as a criticism of the draftsmanship of the provision rather than as an affirmation of Congress' intent to leave intact the 1976 Adjustment Act increases. Senator Hollings' later remark, quoted in the text, indicates that he agreed with his colleagues that the Pay Act constituted a substantive amendment to the Adjustment Act with respect to 1976 increases.

[18] We are aware of the position of the General Accounting Office, relied on in Exec. Order No. 11941, to the effect that the 1976 Pay Act was merely a funding limitation rather than a substantive amendment to the Adjustment Act. See unpublished Comp. Gen Opinions, B-145492 (Sept. 21, 1976), reprinted at 122 Cong. Rec. 31860-31861 (1976), and B-145492 (May 2, 1977). The fundamental issue here, however, is the intention of Congress in enacting the 1976 Pay Act. In our view, these opinions of the GAO misconstrued the congressional design and cannot serve to overcome the clear legisla-

The district court also erred in holding that the 1977 Pay Act did not modify or repeal the Adjustment Act. The 1977 Pay Act quite plainly was intended as an amendment to the Adjustment Act. Unlike the 1976 Pay Act, the 1977 Act was not an appropriations measure at all, but rather a substantive enactment. The 1977 Act provided that the Adjustment Act increases contemplated for October 1977 "shall not take effect," and its legislative history established that its "sole purpose * * * [was] to eliminate the expected October 1977 comparability adjustment for certain individuals in the executive, legislative, and judicial branches whose rates of pay were increased earlier this year pursuant to the recommendations of the Quadrennial Commission [under the Federal Salary Act]." H.R. Rep. No. 95-458, 95th Cong., 1st Sess. 1 (1977). In these circumstances, the district court's summary conclusion that the 1977 Pay Act did not supersede the provisions of the Adjustment Act cannot be sustained.[19]

2. Assuming the Court finds that Congress intended the 1976 and 1977 Pay Acts to supersede the

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tive history set out above. Moreover, we note that Representative Coughlin, in supporting the Conference Report on the 1976 Pay Act, expressly disapproved the GAO interpretation. 122 Cong. Rec. 31893 (1976).

[19] Indeed, in the district court, appellees described the 1977 Pay Act as a "single year repealer" of the Adjustment Act, and they did not contend, as they had with the 1976 Act, that it could be construed as anything but a substantive amendment of the Adjustment Act. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 33.

provisions of the Adjustment Act, we submit that the Pay Acts did not diminish the "compensation" of Article III judges and hence did not violate the Compensation Clause.

The district court held that, upon enactment of the Adjustment Act in 1975, "the right to an annual adjustment, measured by the average adjustment in the General Schedule, became a part of a judges' [*sic*] compensation which may not be 'diminished' " (App. A, *infra*, 8a). Accordingly, the court concluded that the failure to pay the 1976 and 1977 cost-of-living increases contravened the Compensation Clause. However, by its terms, the Adjustment Act provides that cost-of-living adjustments do not become effective until "the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under [the Comparability Act] in the rates of pay under the General Schedule * * *." 28 U.S.C. 461(a) (App. E, *infra*, 26a). In turn, the annual Comparability Act adjustments take effect "as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year * * *." 5 U.S.C. 5305(a)(2) (App. E, *infra*, 28a). Because the Comparability Act increases for 1976 and 1977 became effective in October, the "beginning of the first applicable pay period" for federal judges was October 1 of each year.[20]

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[20] See affidavit of Joseph A. Leach, filed as an attachment to the Memorandum in Support of Plaintiffs' Motion for Summary Judgment.

Thus, prior to October 1, the Adjustment Act increases for judges had not taken effect, and judges had only an expectancy that they would receive a cost-of-living increase, not an entitlement or vested right to such an increase. The cost-of-living increase had not yet been earned by the judges in exchange for work performed, and indeed no services at all had been rendered for any part of the period during which the increase was to be effective.[21] Cf. *United*

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[21] The 1977 Pay Act was enacted on July 11, 1977 (91 Stat. 270), well before the Adjustment Act increases for judges would have otherwise become effective on October 1, 1977. The 1976 Pay Act was passed by the House on September 1, 1976, and by the Senate on September 8; the Conference Report was adopted by both Houses on September 22. See 122 Cong. Rec. 28881, 29377, 31863, 31896-31897 (1976). However, the bill was not signed by the President until October 1, the day that the Adjustment Act increases for judges would otherwise have taken effect, and also the day that Executive Order No. 11941 (3 C.F.R. 151 (1976 Comp.)), implementing the Adjustment Act for that year, was issued. In the court below, appellees argued that for at least a few hours on October 1, 1976, they were entitled to the increased pay that the 1976 Pay Act then purported to take from them. The general rule has long been established, however, that a statute is deemed effective from the first moment of the day on which it was enacted regardless of the precise time it was actually approved by the President. See *Lapeyre* v. *United States*, 84 U.S. (17 Wall.) 191, 198 (1872); *Central Maryland Lines, Inc.* v. *United States*, 240 F. Supp. 254, 257 (D. Md. 1965). Here, no penalty of any kind is imposed by the 1976 Pay Act, and no other reason of "substantial justice" requires departure from the general rule. See *Taylor* v. *Brown*, 147 U.S. 640, 645-646 (1893); *Louisville* v. *Savings Bank*, 104 U.S. 469, 478-479 (1881); *Burgess* v. *Salmon*, 97 U.S. 381

States v. *Larionoff*, 431 U.S. 864, 879 (1977) ("Congress may prospectively reduce the pay of [government officials], even if that reduction deprived * * * [them] of benefits they had expected to be able to earn."). Until the cost-of-living increases took effect and thus became a part of their compensation, federal judges had no unalterable right to those increases and the Compensation Clause did not preclude Congress from superseding the scheduled adjustments.[22]

(1878); *United States* v. *Casson*, 434 F.2d 415, 418-419 (D.C. Cir. 1970). Thus, the 1976 Pay Act precluded the Adjustment Act increases from taking effect, and appellees were never entitled to the 1976 cost-of-living adjustments.

[22] This result is also consistent with the history of the Compensation Clause. As originally proposed, the Clause would have prohibited increases as well as decreases in judges' compensation. See Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308, 312-313 (1976); Fellman, *The Diminution of Judicial Salaries*, 24 Iowa L. Rev. 89, 91 (1938). On Gouverneur Morris' motion, the prohibition on increases was deleted. Rosenn, *supra*, at 313; Fellman, *supra*, at 91. Madison strongly opposed this change, arguing that it would lead to judicial dependence on the legislature. Rosenn, *supra*, at 313-314; Fellman, *supra*, at 91-92. As Madison stated:

> The dependence will be less if the *increase* alone should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue compliance in the former may be felt towards the latter. [Emphasis in original.]

2 M. Farrand, *The Records of the Federal Convention of 1787* 45 (1966). Morris' motion to strike the prohibition on increases was carried, and Madison's subsequent attempts to reinstate the restriction proved unsuccessful. Rosenn, *supra*, at 314 & n.24; Fellman, *supra*, at 92. Thus, the history of

Moreover, the district court's holding—that future increases under the Adjustment Act are part of a judge's compensation protected by the Compensation Clause—would severely limit Congress' constitutional prerogatives in the setting of judicial salaries. Under the decision below, Congress would forever be precluded from modifying the law in any manner that would afford sitting Article III judges a lesser salary than they would receive pursuant to the Adjustment Act. To construe the Compensation Clause, as the district court did, to provide a perpetual guarantee that judges will continue to receive not only their present salaries but also "an annual adjustment, measured by the annual adjustment in the General Schedule" (App. A, *infra*, 8a), and thus to require that the Adjustment Act scheme be permanently frozen into law, would be a serious and wholly unjustified intrusion on congressional power having no support in the history or purpose of the Compensation Clause.[23]

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the Compensation Clause reveals that, notwithstanding concerns expressed about the effect on judicial independence, the Founding Fathers deliberately empowered Congress to raise, or to refuse to raise, the salaries of federal judges. In our view, there is no meaningful difference between the authority of Congress, consistent with the Compensation Clause, to consider but refuse to enact salary increases for Article III judges and its analogous authority to rescind an increase that has not yet gone into effect.

[23] The district court's reasoning also suggests that the Federal Salary Act would likewise be permanently frozen into law with respect to sitting federal judges.

3. In the event the Court concludes that the failure to pay the scheduled cost-of-living increases in 1976 and 1977 constituted a diminution of judges' compensation, we submit that this diminution did not offend the Compensation Clause because the 1976 and 1977 Pay Acts did not discriminate against federal judges or undermine their independence.

Although this Court has had little occasion to consider the Compensation Clause, the purpose of the Clause is well established. As the Court explained in *Evans* v. *Gore*, 253 U.S. 245, 253 (1920):

> [T]he primary purpose of the prohibition against diminution was * * *, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

The leading, and most recent, decision of this Court regarding the Compensation Clause is *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939). In *Woodrough*, the Court upheld the validity of the federal income tax statute as applied to federal judges who assumed office after the passage of the statute. Finding that the tax did not discriminate against federal judges or impair the independence of the federal judiciary, the Court rejected the contention that the statute infringed the Compensation Clause (*id.* at 281-282; footnote omitted):

> [T]he question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1, of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.[24]

Woodrough expressly overruled (307 U.S. at 283) the decision in *Miles* v. *Graham*, 268 U.S. 501 (1925),

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[24] The *Woodrough* opinion echoed Justice Holmes' dissent in *Evans* v. *Gore* that requiring "a man to pay the taxes that all other men have to pay cannot possibly be used as an instrument to attack his independence as a judge" (253 U.S. at 265).

which had invalidated, under the Compensation Clause, the application of the income tax to federal judges appointed after the inception of the tax. *Woodrough* also criticized the decision in *Evans* v. *Gore*, *supra*, which had overturned the federal income tax statute as applied to federal judges who took office prior to enactment of the tax. The Court in *Woodrough* noted that *Evans* had "met wide and steadily growing disfavor from legal scholarship and professional opinion * * * [and] was rejected by most of the courts before whom the matter came after that decision" (307 U.S. at 281; footnotes omitted). These observations by the Court, as well as the Court's basic analysis, show that the decision in *Woodrough* repudiated *Evans'* central premise that the Compensation Clause is "directed against all diminution, whether for one purpose or another * * *" (253 U.S. at 255).[25]

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[25] Justice Butler, in his dissent in *Woodrough*, recognized that the majority's decision "destroy[s] the decision in *Evans* v. *Gore*" (307 U.S. at 297) and that "the Court now repudiates its earlier decisions" in *Evans* v. *Gore* and *Miles* v. *Graham* (307 U.S. at 299). Lower federal courts and commentators have also read *Woodrough* as disapproving the *Evans'* holding. See, *e.g.*, *Atkins* v. *United States*, 556 F.2d 1028, 1043-1045, 1047-1048, 1051 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978); *Magruder* v. *Brown*, 106 F.2d 428, 430, 431 (4th Cir. 1939), cert. denied, 308 U.S. 624 (1940); Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 U.C.L.A. L. Rev. 308, 332-333 n.94 (1976); 53 Harv. L. Rev. 137 (1939); 15 Ind. L. J. 159, 161 n.11 (1939); 13 S. Cal. L. Rev. 131, 132 (1939). And in *Baker* v. *Commissioner*, 149 F.2d 342, 344 (4th Cir.), cert. denied, 326 U.S. 746 (1945), the court stated that under

In our view, *Woodrough* sets forth the governing principles under the Compensation Clause. Applying those principles here, it is evident that the 1976 and 1977 Pay Acts did not violate the Constitution. The Pay Acts did not discriminate against federal judges, but rather were equally applicable to a broad range of ranking government officials, including the Vice President, Cabinet officers and Executive Schedule personnel, and members of Congress. Similarly, it cannot be said that the Pay Acts, in either purpose or effect, made "inroads upon the independence of judges." [26] Rather, the 1976 Pay Act was part of the congressional effort to be held accountable "on [the] public record" when salaries are increased for top government officers (122 Cong. Rec. 28872 (1976) (remarks of Rep. Shipley)) and to "strike a blow for economy in Government" by eliminating the automatic cost-of-living salary increases for these officials in 1976 (*id.* at 28877 (remarks of Rep. Udall)). The 1977 Pay Act was specifically designed to deal with the "anamolous situation" in which these ranking government officials, having already received a sub-

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Woodrough a judge could constitutionally be required to pay higher taxes as part of a general increase in the tax system, a conclusion that implicitly acknowledges that the *Evans* analysis was discredited by *Woodrough*.

[26] Appellees did not allege in the district court that the Pay Acts discriminated against federal judges or constituted an attack on their independence, and there is no evidence whatever that the Acts were prompted by Congress' antagonism against the judiciary or its displeasure with any particular federal judges or judicial decisions.

stantial pay raise in March 1977 pursuant to the Federal Salary Act, would have gotten a second raise in the same calendar year if the Adjustment Act increases scheduled for October 1977 had been allowed to take effect (H.R. Rep. No. 95-458, 95th Cong., 1st Sess. 2 (1977)). We submit that nothing in the Compensation Clause precludes Congress from including federal judges in such legitimate, nondiscriminatory legislation.[27]

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[27] The decisions in *O'Donoghue* v. *United States*, 289 U.S. 516 (1933), and *Booth* v. *United States*, 291 U.S. 339 (1934), do not lead to a different conclusion. In *O'Donoughue*, the Court held that the courts of the District of Columbia were established under Article III of the Constitution and thus that the judges of those courts were within the statutory provision exempting from pay reductions during the Depression all "judges whose compensation may not, under the Constitution, be diminished during their continuance in office." The Court in *O'Donoghue* expressly limited its decision to the statutory question and disclaimed resolution of any constitutional issues under the Compensation Clause (289 U.S. at 529); in particular, the Court did not decide whether, in the absence of the statutory exemption, Congress could constitutionally have applied the salary reductions to Article III judges. In *Booth*, the Court held, as conceded by the Solicitor General, that a reduction after an increase in a judge's salary, even though not a reduction below the salary in effect at the time of the judge's appointment to the bench, is a reduction in compensation (29 U.S. at 352). We do not challenge this holding here. Hence, if the 1976 and 1977 Pay Acts were otherwise unconstitutional, they cannot be saved simply because the salaries nevertheless remain above the levels that existed at the time the judges assumed office. However, *Booth* does not bear on the question whether the nondiscriminatory failure to pay cost-of-living increases violates the Compensation Clause. Moreover, both *O'Donoghue* and *Booth* were decided prior to this Court's decision in *O'Malley* v. *Woodrough, supra.*

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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Attorney

DECEMBER 1979

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* The Solicitor General is disqualified in this case.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 78 C 420

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE B. HARRIS, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed August 29, 1979]

ORDER

Plaintiffs, thirteen federal district court judges,[1] have sued the Government to recover compensation allegedly due them for their services as federal judges during part or all of the period commencing October 1, 1976 and continuing to March 1, 1977.

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[1] The named plaintiffs represent members of a class comprised of 600 judges from the United States District Court for the Eastern District of New York, the United States District Court for the Northern District of California, the United States District Court for the Northern District of Illinois, and the United States District Court for the Eastern District of Louisiana.

Jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1346(a)(2).

In this motion, we must decide whether the Compensation Clause of Article III § 1 of the United States Constitution has been violated by Congress' refusal to pay plaintiffs a cost-of-living adjustment for the salary periods commencing October 1, 1976 and October 1, 1977. Because we find that Congress' refusal to pay plaintiffs a cost-of-living adjustment directly diminished the compensation to which plaintiffs were entitled, we conclude that the Compensation Clause has been violated and, accordingly, we grant plaintiffs' motion for summary judgment.

The facts underlying plaintiffs' claim in the instant case are as follows. In 1975, Congress amended Section 135 of Title 28,[2] the section which defines the salary component of a federal judge's compensation, to provide that:

> Each judge of a district court of the United States shall receive a salary at our annual rate determined under Section 225 of the Federal Salary Act of 1967 . . . as adjusted by Section 461 of this title.

In August, 1975, Section 461 of Title 28, the Executive Salary Cost-of-Living Adjustment Act (the "Adjustment Act"), was passed, providing that salaries of judges and other executive level employees

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[2] Prior to the 1975 Amendment Section 135 provided that "(e)ach judge of a district court of the United States shall receive a salary of $30,000 a year." The $30,000 salary was increased to $40,000 by operation of the Federal Salary Act of 1967. 2 U.S.C. § 351.

shall include an annual adjustment measured by the average percentage adjustment in the General Schedule as determined under the Federal Pay Comparability Act of 1970 (the "Comparability Act"), 5 U.S.C. § 5305 et. seq.[3]

On October 6, 1975, the President issued Executive Order No. 11883 adjusting General Schedule and Executive Schedule level salaries by an average of five percent, thus setting the salary of district judges at $42,000 effective October 1, 1975.

On October 1, 1976, the annual rates of pay for General Schedule employes were increased by an average of 4.8% in accordance with the applicable provision of the Comparability Act of 1970. Accordingly, on October 1, 1976 pursuant to the applicable provisions of the Adjustment Act, the President issued Executive Order No. 11941 adjusting all Executive Schedule salaries, which includes those of federal judges, by approximately 4.8%. The annual salary of circuit judges was thereby established at $46,800; the annual salary of district judges was thereby established at $44,000 effective October 1, 1976.[4]

Also on October 1, 1976, Congress passed the Legislative Appropriations Act of 1977, P.L. 94-440 (the "Appropriations Act"). Among other things, this

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[3] The Federal Pay Comparability Act provides a mechanism under which the vast majority of federal employees have received each year since 1970, a pay adjustment approximating the rise in the cost-of-living in the private sector.

[4] Circuit judges include judges of the Court of Claims and judges of the Court of Customs and Patent Appeals. District judges include judges of the United States Customs Court.

Act prohibited the use of funds to pay the salaries of Executive level employees, which includes federal district court judges, at a rate which exceeded the annual salary in effect on September 30, 1976. As a result, the 4.8% cost-of-living adjustment established by Executive Order No. 11941 was not paid to plaintiffs.

On July 11, 1977, Congress passed P.L. 95-66 providing that any adjustment in Executive Salary levels, which would ordinarily go into effect on October 1, 1977, "shall not take effect."

On September 28, 1977, the President issued Executive Order No. 12010, pursuant to the Comparability Act, increasing by an average of 7.2% the rates of pay of General Schedule employees. The Executive Order excluded a similar adjustment in the rate of pay applicable to federal judges and other Executive Schedule employees due to the limitation imposed under P.L. 95-66.

Plaintiffs' complaint contains two counts. Count I alleges that the Legislative Branch Appropriations Act of 1977, P.L. 94-440, had no effect on the lawful rates of pay to which the judges' became entitled under Executive Order No. 11941 and, as a result, Congress' failure to pay plaintiffs a cost-of-living adjustment for the period commencing October 1, 1976 violates the Compensation Clause. Additionally, plaintiffs' maintain that even if the Appropriations Act had the effect of redefining the applicable salary levels, such action by Congress nevertheless directly diminishes their compensation in violation of the Compensation Clause.

Count II of plaintiffs' complaint alleges that P.L. 95-66 also unconstitutionally diminished the plaintiffs' compensation insofar as it purports to preclude payment of the salary adjustment commencing on October 1, 1977.

In response to these contentions, defendant filed a motion for judgment on the pleadings pursuant to Rule 12(c), Federal Rules of Civil Procedure, contending that both Public Law 94-440, the Appropriations Act of 1977, attacked in Count I and Public Law 95-66 attacked in Count II of plaintiffs' complaint suspended the operation of the Adjustment Act so that the cost-of-living increases did not become a part of judicial compensation. Additionally, defendant argues that even if the increases had become part of the plantiffs' compensation, the compensation was not diminished in violation of the Compensation Clause because neither the Appropriations Act nor Public Law 95-66 had the purpose or effect of discriminatorily attacking the independence of judges through financial means. Accordingly, argues defendant, the plantiffs have failed to state a cause of action and, therefore, judgment on the pleadings should be awarded in defendant's favor.

Plaintiffs, in turn, filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. Because this court has considered affidavits submitted by plaintiffs in rulings on these motions, we have considered the parties allegations in accordance with the rules governing summary judgments. See, Rule 12(b)(6) and (c), Federal Rules

of Civil Procedure. The Supreme Court has stated that summary judgment is appropriate where the court finds that on the basis of the pleadings and affidavits, no genuine issue of any material fact is presented and the moving party is entitled to judgment as a matter of law. See, e.g., *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944) and Rule 56(c), Federal Rules of Civil Procedure.

In the instant case, the facts are not in dispute. The government does not dispute that plaintiffs were denied the cost-of-living adjustment provided for under 28 U.S.C. §§ 135, 461. Rather, the parties disagreement centers around the question whether the cost-of-living adjustment constitutes part of the "compensation" to which the plaintiff-judges are entitled. Plaintiff asserts that this adjustment is part of the compensation to which they are entitled by law, and consequently, Congress' refusal to pay those adjustments violates the prohibition in the Compensation Clause which prohibits the diminishment of a judge's salary during his continuance in office.

Defendant maintains that the adjustment does not comprise part of the compensation to which judges are entitled, and, therefore, Congress' refusal to pay plaintiffs these adjustments does not constitute a violation of the Compensation Clause. The government's position rests, however, on several unsupportable and unpersuasive grounds. First, the government argues that the cost-of-living adjustment does not become part of the compensation to which plaintiffs are entitled until the percentage by which the

salary shall be adjusted is declared. Defendant maintains that until this percentage is declared and the statutory process is set into motion and completed, Congress has not definitely declared what sum a judge shall receive as compensation. Therefore, maintains defendant, prior to the time when the percentage is fixed, Congress may abort or suspend the process so as to bar judges from receiving a cost-of-living adjustment.

Second, the government maintains that even if Congress' action constitutes a diminution of plaintiffs' compensation, the diminishment in the instant case does not violate the Compensation Clause because it is not a diminishment which discriminates against judges in such a way as to make inroads upon their independence.

This court finds that the cost-of-living adjustment provided for under 28 U.S.C. § 135 constitutes a part of the compensation to which plaintiffs are entitled during their terms as judges, and consequently, Congress' refusal to pay those adjustments violates the Compensation Clause.

The Compensation Clause of Article III, Section 1 of the United States Constitution provides:

> The Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Plaintiffs submit that once the Executive Salary Cost-of-Living Act granting judges "a salary at an

annual rate determined under Section 225 of the . . . Salary Act . . . as adjusted by Section 461 of this Title", "The Adjustment Act", became law, the right to an annual adjustment, measured by the average adjustment in the General Schedule, became a part of a judges' [*sic*] compensation which may not be "diminished." We agree.

In *Miles* v. *Graham*, 268 U.S. 501, 508-509 (1925), the Supreme Court defined the constitutional term "compensation" stating that:

> The words and history of the clause indicate that the purpose was to impose upon Congress *the duty definitely to declare what sum shall be received* by each judge out of the public funds and the times for payment. When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.

Emphasis Supplied. See also, *Evans* v. *Gore*, 252 U.S. 245 (1920), and *Atkins* v. *United States*, 556 F.2d 1028, 1044 (Ct. Cl. 1977).

Accordingly, when in 1975 Congress unequivocally declared that the compensation which "judges of a district court shall receive" shall include "an annual rate determined under Section 225 of the Federal Salary Act of 1967 . . . *as adjusted by Section 461* . . .", Congress complied with its duty to definitely declare what sum shall be received by each judge out of the public funds. Consequently, the annual salary provided under Section 225 "as adjusted by Section

461" became the compensation for the plaintiffs which was protected against dimunition.

This conclusion is supported by a reading of both the history of the constitutional provision and the case law interpreting that provision. Contrary to the defendant's assertion, the case law does not state that a definite dollar amount must be declared, but rather, that Congress must specifically provide for the compensation to be paid to each judge. Once Congress has statutorily provided for the compensation to which judges shall be entitled, the compensation specified becomes protected against diminution during the judges' continuation in office. Whether Congress has specified a dollar amount which judges shall receive, or has provided a statutory method for calculating the amount a judge shall receive is immaterial. What is significant is the specific provision for judicial compensation, a provision which can then become the guarantee of compensation. *United States* v. *More*, 3 Cranch 160 (1803) is a case on point. In *More*, the Circuit Court of Columbia held that an Act of Congress abolishing fees charged by justices of the peace in the District of Columbia could not be invoked as to those justices who took office at a time when such fees were lawful. Central to the courts decision is the recognition that the compensation to which justices of the peace were entitled was the compensation provided for by law at the time the justices assumed office. Moreover, the fact that the amount of the fee was not determined until the completion of a judges' service was not material.

> The Act of Congress of the 27th of February, 1801, which constitutes the office of justice of peace . . . ascertains the compensation which they shall have for their services in holding their courts . . . This Compensation is given in the form of fees, payable when the services are rendered . . . If his compensation has once been fixed by law, a subsequent law for diminishing that compensation (a fortiori for abolishing it) cannot affect that justice of the peace during his continuance in office, . . .

Clearly, on the basis of the *More* case alone, the only supportable conclusion in the instant case is that Congress' attempt to eliminate or avoid the provision for a cost-of-living adjustment provided for under Title 28, U.S.C. §§ 135, 461 as a component of plaintiffs' compensation is unconstitutional.

However, this result is mandated by subsequent Supreme Court cases construing the meaning of Article III § 1.

Evans v. *Gore*, 253 U.S. 245 (1920) enunciated principles governing the application of the Compensation Clause.[5] The plaintiff in *Evans* had been a district judge since 1899. In 1919 the Act of February 24, 1919, 40 Stat. 1062, fixed his net income for the first time. The Court held that Article III § 1 prevented Congress from imposing an income tax on the salary of judges despite the fact that the tax

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[5] While *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939) overruled *Miles* v. *Graham*, 268 U.S. 501 (1925) and, consequently, overruled a good deal of *Evans*, the Supreme Court's enunciation of principles concerning the meaning of the Compensation Clause continue to be valid. *See Atkins* v. *U.S.*, 556 F.2d 1028, 1043 (Ct. Cl. 1977).

applied uniformly to all individuals. Noting that the prohibition in Article III § 1 is general, containing no excepting words and applying to all dimunitions whether direct, indirect or evasive, the court held that all dimunitions,

> . . . which by their necessary operation and effect withhold or take from the judge a part of that which he has been promised by law for his services must be regarded as within the prohibition.

253 U.S. at 254-255. In the instant case, the plaintiff judges were promised by law that their compensation would include "an annual salary" "as adjusted by" the cost-of-living adjustment provided for in 28 U.S.C. § 461. Accordingly, Congress' effort to withhold or take from the plaintiffs that component of their compensation comprised of a cost-of-living adjustment falls within the prohibition of the Compensation Clause.

After *Evans*, the Article III § 1 prohibition was applied to an income tax law enacted prior to a judge assuming office, and as a result the judge could not be taxed. *Miles* v. *Graham*, 268 U.S. 501, 509 (1925).

However, in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), the Supreme Court made it clear that the prohibition in the Compensation Clause applied only to dimunitions effected during a judge's term in office. Critical to the Court's decision was the fact that Judge Woodrough had been appointed to his position *after* the effective date of the applicable tax law, § 22 of the Revenue Act of 1932, 47 Stat. 169, 178. Consequently, the judge would be required to pay the tax.

The court took care to note that, though Judge Woodrough's income was being taxed pursuant to the Revenue Act of 1936 (49 Stat. 1648, 1657),

> ". . . the power of Congress to include Judge Woodrough's salary as a circuit judge in his gross income must be judged on the basis of the validity of (the 1932 Act) . . . (f)or it was . . . (the 1932 Act) that gave notice to all judges thereafter appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes."

307 U.S. at 280. The critical point which emerges from these cases is clear. In each instance where Congress has attempted to effect a change in the compensation to which an Article III judge is entitled either by altering, amending, or repealing the statutory provision providing for the judicial compensation existing at the time the plaintiff judge assumed office, the Supreme Court has declared Congress' actions unconstitutional where it has resulted in a diminishment in the amount of compensation to which the judge was previously entitled. While such a change would be permitted if it were to increase a judge's salary, because of the Compensation Clause, Congress may not effect an alteration, amendment, or change that would diminish what the judge was entitled to when he assumed office. The reasoning behind this prohibition is clearly demonstrated in the history of Article III § 1.

> The provision for the permanent support of the judges is well calculated, in addition to the ten-

> ure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station.

1 Kent Com. 294.

The underlying import of Article III § 1 reflects the Founding Fathers concern that the judges be ensured the same salary throughout their tenure as that provided for by law when they assumed office. With a guaranteed salary established, the independence of the bench, a bench which is not occupied by "men who depend upon the smiles of the crown for their daily bread," will be better insured. Chief Justice Taney discussed the importance of an independent judiciary stating:

> Its duties and powers are . . . of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such inference, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation. Language could not be more plain than that used in the Constitution.

157 U.S. 701, 702.

The government's assertion that the cost-of-living adjustment provided for in Title 28 U.S.C. § 135 is not a part of a judge's compensation until the per-

centage amount of the adjustment is declared miscontrues entirely both the language and the history of the Compensation Clause.

Defendants arguments lead to two results specifically prohibited by the Compensation Clause. First, this argument suggests that Congress has not fulfilled its duty to specifically declare what sum a judge shall receive during his continuance in office so that he is on notice when he assumes his position. However, as the case law makes clear, the purpose of the Compensation Clause was to impose this duty upon Congress so that the judiciary would not be dependent upon the smiles of the crown for their daily bread. *Miles* v. *Graham, supra.* Second, by contending that Congress may suspend the operation of the cost-of-living adjustment because it is dependent upon a complex statutory machinery, defendants are also suggesting that the annual salary component of Title 28 U.S.C. § 135 could conceivably be withheld because one must also look to another statutory section to determine what the stated annual salary shall be. This argument is tantamount to the suggestion that an employer need not honor the cost-of-living adjustment called for in a union-wage agreement because the exact amount of the adjustment was not known when the provision was adopted, a contention no labor lawyer would seriously advance.

The Compensation Clause's prohibition is not concerned with the method selected by Congress for determining judicial compensation. Rather, its concern is that once the method is selected it not be

altered to diminish the compensation to which judges are entitled. Contrary to the government's assertion, Article III § 1 specifically intends to restrict and limit Congress' power over judicial compensation.

Moreover, if Congress had not intended that the cost-of-living adjustment be a part of the compensation to which plaintiffs were entitled, there would be no reason for the 1975 amendment which included this component provision in § 135, Title 28 U.S.C. for the first time, where previously there had been only a stated annual salary. In fact, *Atkins* v. *U.S.*, 556 F.2d 1028 (Ct.Cl. 1977), a case heavily relied upon by defendants, was concerned with a claim similar to that made by plaintiffs in the instant case. However, central to the court's decision in *Atkins* that there was no violation of the Compensation Clause was the fact that there was no statute providing for a cost-of-living adjustment.

In *Atkins*, plaintiffs claimed "that the failure of Congress to raise their salaries by more than five percent since 1969, coupled with severe economic inflation in the interim" was a violation of the Compensation Clause because the "real value" of purchasing power of a judge's unadjusted compensation had decreased.

In reaching its conclusion that this failure by Congress to adjust the judge's compensation did not constitute the prohibited diminishment contemplated in Article III § 1, the Court distinguished between direct dimunition and indirect dimunitions. A clear understanding of the distinctions made by the *Atkins* court

between direct and indirect dimunitions is critical because it serves to directly undermine the defendants second contention that the dimunition alleged in the instant case does not violate the Compensation Clause's prohibition because it does not discriminate against judges in such as to make inroads on their independence.

The *Atkins* court specifically stated that where, as in the instant case, there is a direct dimunition because Congress attempts to alter or avoid the payment of a compensation provided for by law, the clause is unequivocal in its proscription. However, where an indirect dimunition occurs the court, while explicitly recognizing that a cause of action may be stated, required that such dimunition be the product of a demonstrable discriminatory attack upon the independence of the judiciary in order to support the relief requested. In *Atkins*, the court found that Congress' failure to raise judicial salaries in the face of uncontrolled inflation resulted in an indirect dimunition, but was not violative of the Compensation Clause because it could not be considered an assault upon the independence of the judiciary.

In the instant case, Congress specifically provided that a judge's compensation shall be an annual salary as adjusted by § 461, the Adjustment Act. Consequently, Congress' attempt to avoid, repeal, or suspend the operation of this part of a judge's compensation amounts to a direct dimunition of the plaintiff judges' compensation in violation of the Compensation Clause.

At this point it should be noted that a determination that the cost-of-living adjustment for any year would be 0% could conceivably be permissible. But, the instant attempt to directly diminish plaintiffs' compensation by indirect means cannot be tolerated. In fact, Congress itself has recognized this limitation on their power to effect judicial salaries. In *O'Donoghue* v. *U.S.*, 289 U.S. 516 (1932), the statute under consideration was the Legislative Appropriation Act of June 30, 1932. The Act provided in pertinent part for a reduction in the rate of compensation during the fiscal year ending June 30, 1933, for "all judges (except whose compensation may not, under the Constitution, be diminished during their continuance in office) . . . ." The issue in *O'Donoghue* was whether the plaintiff judge was appointed pursuant to Article III § 1, a fact not in dispute in the instant case. The Court in *O'Donoghue* noted that:

> In framing the Constitution therefore, the power to diminish the compensation of the federal judges was explicitly denied, in order, *inter alia*, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the persons, would otherwise hold the power to reduce their means of support.

289 U.S. 531. In fact, in the instant case, Congress has explicitly recognized this same limitation in their powers to effect a judge's salary during his continuance in office. Section (b) of the Adjustment Act, the very Act which is in dispute, provides that the pay

adjustment provision of the Act "shall not apply to the extent it would reduce the salary of an individual whose compensation may not, under § 1 of Article III be diminished during such individual's continuance in office."

Moreover, it should be noted that Congress' failure to appropriate funds for the October 1, 1976 adjustment does not preclude recovery for compensation otherwise due. In *New York Airways, Inc.* v. *U.S.*, 369 F.2d 743 (Ct. Cl. 1966), the defendants contended that plaintiffs could not be paid because of Congress' deliberate action of appropriating less than the amount required to meet plaintiff's payments. The court rejected this argument stating:

> It has long been established that the mere failure of Congress to appropriate funds without words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a governmental obligation created by statute.

369 F.2d at 748. See also, *State of Louisiana* v. *Weinberger*, 369 F.Supp. 856, 860 (E.D. La. 1973); *Concerned Residents of Buck Hills Falls* v. *Grant*, 537 F.2d 29 (3rd Cir. 1976). Neither P.L. 94-440 nor P.L. 95-66 contains language which expressly or impliedly indicates that Congress was modifying or repealing the provisions of the Adjustment Act.

Nevertheless, in spite of the government's assertions as to the intended effect of P.L. 94-440 and 95-66, the fact remains that as to the plaintiff judges

Congress is powerless to effect a change which diminishes the compensation provided for by statute, and promised to plaintiffs, when they assumed office. For these reasons, plaintiffs motion for summary judgment is granted.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated: August 29, 1979

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action File No. 78C 420

HUBERT L. WILL, ET AL

vs.

U.S.A.

[Filed September 24, 1979]

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Stanley J. Roszkowski, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that a judgment is hereby entered on Count I of the Amended Complaint for plaintiffs and each member of the class defined in Count I for the amount of unpaid compensation due for the period October 1, 1976 through March 1, 1977, said amount being that amount which should have been paid under the provisions of the Executive Salary Cost-of-Living Act, P. L. 94-82, 5 U. S. C. 5318, and 28 U. S. C. 461 as a salary adjustment effective October 1, 1976.

It is further ordered that a judgment shall be and hereby is entered on Count II of the Amended Complaint for plaintiffs and each member of the class defind [*sic*] in Count II for the amount of unpaid compensation due for the period October 1, 1977 to the date of this judgment order pursuant to Executive Salary Cost of Living Act, P. L. 94-82, 5 U. S. C. 5318 and 28 U. S. C. 461 as a salary adjustment effective October 1, 1977.

It is further ordered that plaintiffs and plaintiff classes shall recover the amounts as set forth above from defendant with interest thereon as provided by law from this date.

Dated at Chicago, Illinois, this 24th day of September, 1979.

H. Stuart Cunningham
Clerk of Court

By /s/ H. R. Cheng

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil No. 78 C 420

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE B. HARRIS, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed September 26, 1979]

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. 1252, the defendant United States of America hereby appeals to the Supreme Court of the United States from the order granting plaintiffs' motion for summary judgment entered August 29, 1979.

Respectfully submitted,

ALICE DANIEL
Acting Assistant
Attorney General

/s/ Anthony J. Steinmeyer
ANTHONY J. STEINMEYER

/s/ David M. Glass
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Attorneys for Defendant

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil No. 78 C 420

HUBERT L. WILL, JOHN R. BARTELS, HENRY BRAMWELL, LLOYD H. BURKE, WILLIAM J. CAMPBELL, FRED J. CASSIBRY, MARK A. COSTANTINO, JACK M. GORDON, GEORGE B. HARRIS, EDWARD R. NEAHER, THOMAS COLLIER PLATT, JR., GEORGE C. PRATT, and SPENCER WILLIAMS, on their own behalf and on behalf of all persons similarly situated, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed October 17, 1979]

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. 1252, the defendant United States of America hereby appeals to the Supreme Court of the United States from the judgment entered in this action on September 24, 1979.

Respectfully submitted,

ALICE DANIEL
Acting Assistant
Attorney General

/s/ Anthony J. Steinmeyer
ANTHONY J. STEINMEYER

/s/ David M. Glass
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Attorneys for Defendant

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause of the United States Constitution, Article III, Section 1, provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. 135 provides:

> Each judge of a district court of the United States shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

28 U.S.C. 461 provides:

> (a) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100) equal to the percentage of such salary rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under such section 5305) of the

adjustments in the rates of pay under such Schedule.

(b) Subsection (a) shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office.

5 U.S.C. 5305 provides in pertinent part:

(a) In order to carry out the policy stated in section 5301 of this title, the President shall—

(1) direct such agent as he considers appropriate to prepare and submit to him annually, after considering such views and recommendations as may be submitted under the provisions of subsection (b) of this section, a report that—

(A) compares the rates of pay of the statutory pay systems with the rates of pay for the same levels of work in private enterprise as determined on the basis of appropriate annual surveys that shall be conducted by the Bureau of Labor Statistics;

(B) makes recommendation for appropriate adjustments in rates of pay; and

(C) includes the views and recommendations submitted under the provisions of subsection (b) of this section;

(2) after considering the report of his agent and the findings and recommendations of the Advisory Committee on Federal Pay

reported to him under section 5306(b)(3) of this title, adjust the rates of pay of each statutory pay system in accordance with the principles under section 5301(a) of this title, effective as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year; and

(3) transmit to Congress a report of the pay adjustment, together with a copy of the report submitted to him by his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(b) In carrying out its functions under subsection (a)(1) of this section, the President's agent shall—

(1) establish a Federal Employees Pay Council of 5 members who shall not be deemed to be employees of the Government of the United States by reason of appointment to the Council and shall not receive pay by reason of service as members of the Council, who shall be representatives of employee organizations which represent substantial numbers of employees under the statutory pay systems, and who shall be selected with due consideration to such factors as the relative numbers of employees represented by the various organizations, but no more than

3 members of the Council at any one time shall be from a single employee organization, council, federation, alliance, association, or affiliation of employee organizations;

(2) provide for meetings with the Federal Employees Pay Council and give thorough consideration to the views and recommendations of the Council and the individual views and recommendations, if any, of the members of the Council regarding—

(A) the coverage of the annual survey conducted by the Bureau of Labor Statistics under subsection (a)(1) of this section (including, but not limited to, the occupations, establishment sizes, industries, and geographical areas to be surveyed);

(B) the process of comparing that rates of pay of the statutory pay systems with rates of pay for the same levels of work in private enterprise; and

(C) the adjustments in the rates of pay of the statutory pay systems that should be made to achieve comparability between those rates and the rates of pay for the same levels of work in private enterprise;

(3) give thorough consideration to the views and recommendations of employee organizations not represented on the Federal Employees Pay Council regarding the subjects in paragraph (2)(A)-(C) of this subsection; and

(4) include in its report to the President the views and recommendations submitted

as provided in this subsection by the Federal Employees Pay Council, by any member of that Council, and by employee organizations not represented on that Council.

(c) (1) If, because of national emergency or economic conditions affecting the general welfare, the President should, in any year, consider it inappropriate to make the pay adjustment required by subsection (a) of this section, he shall prepare and transmit to Congress before September 1 of that year such alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefor, in lieu of the pay adjustments required by subsection (a) of this section. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems.

(2) An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after October 1 of the applicable year and continues in effect unless, before the end of the first period of 30 calendar days of continuous session of Congress after the date on which the alternative plan is transmitted, either House adopts a resolution disapproving the alternative plan so recommended and submitted, in which case the pay adjustments for the statutory pay systems shall be made effective as provided by subsection (m) of this section. The continuity of a session is broken only by an adjournment of the Congress sine die,

and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 30-day period.

* * * * *

(m) If either House adopts a resolution disapproving an alternative plan submitted under subsection (c) of this section, the President shall take action required by paragraphs (2) and (3) of subsection (a) of this section and adjust the rates of pay of the statutory pay systems effective as of the beginning of the first applicable pay period commencing on or after the date on which the resolution is adopted, or on or after October 1, whichever is later.

Title II of the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, 1446 provides in pertinent part:

Provided, That none of the funds contained in this Act shall be used to increase salaries of Members of the House of Representatives pursuant to section 204a of Public Law 94-82 in excess of the salary rate in effect on September 30, 1976, for such position or officer. No part of the funds appropriated in this Act or any other Act shall be used to pay the salary of an individual in a position or office referred to in section 225(f) of the Federal Salary Act of 1967, as amended (2 U.S.C. 356), including a Delegate to the House of Representatives, at a rate which exceeds the salary rate in effect on September 30, 1976, for such position or office except increases submitted by the President pursuant to section 225 of the Federal Salary Act of 1967.

Public Law No. 95-66, 91 Stat. 270, provides:

> That, the first adjustment which, but for this Act, would be made after the date of enactment of this Act under the following provisions of law in the salary or rate of pay of positions or individuals to which such provisions apply, shall not take effect:
>
> (1) the second sentence of section 104 of title 3, United States Code, relating to comparability adjustments in the salary of the Vice President of the United States;
>
> (2) paragraph (2) of section 601(a) of the Legislative Reorganization Act of 1946 (2 U.S.C. 31), relating to comparability adjustments in the annual rate of pay of Members of Congress;
>
> (3) section 461 of title 28, United States Code, relating to comparability adjustments in the salary and rate of pay of justices, judges, commissioners, and referees; and
>
> (4) section 5318 of title 5, United States Code, relating to comparability adjustments in the annual rate of pay for positions in the Executive Schedule.

28 U.S.C. 2109 provides:

> If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc

or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

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